

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMONA MAESTAS and DEPARTMENT OF THE ARMY,
ROCKY MOUNTAIN ARSENAL, Denver, CO

*Docket No. 00-1002; Submitted on the Record;
Issued February 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained a recurrence of disability commencing on or around September 1, 1997, causally related to her January 3, 1968 injuries; and (2) whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity determination.

The Office accepted that on January 3, 1968 appellant, then a 21-year-old munitions operator, sustained a laceration of the left Achilles tendon and posterior tibial nerve, when a waste container exploded. Thereafter the Office accepted that appellant also sustained low back strain and situational anxiety and insecurity. Appellant stopped work on the date of injury and was paid appropriate compensation benefits; she never returned to work and she received a schedule award for a 20 percent permanent impairment of her left leg.

Appellant's compensation for temporary total disability was reduced in 1981 as she was determined to be physically able to work for four hours per day as a telephone solicitor. This decision was affirmed by the Branch of Hearings and Review on August 23, 1982. Appellant's request for reconsideration was denied on November 2, 1982 due to insufficient medical evidence.

Appellant submitted annually medical progress reports from Dr. Kasiel Steinhardt, a Board-certified orthopedic surgeon and her treating physician. He opined that appellant remained totally disabled due to the same diagnoses: "[r]esiduals of soft tissue injury to left leg with residual scarring, [c]hronic lumbosacral sprain [and] [s]train left hip region" and continued to require medication and the use of a cane.¹ Appellant's symptoms were noted continually to be unchanged.

¹ Dr. Steinhardt did note that appellant felt that her left foot was inverting more, but that examination was about the same.

On September 14, 1998 appellant filed a Form CA-2a notice of recurrence of disability alleging that on or around September 1, 1997 she sustained a recurrence of disability.

By letter dated October 22, 1998, the Office advised appellant of what evidence was necessary to establish a recurrence of disability.

In support appellant submitted a June 1, 1998 report, from Dr. James M. Yeash, an osteopathic physician, who reviewed appellant's factual and medical history, noted that she had not been able to maintain any position for the period of time required to do any work, stated that she had attempted to work sedentary duty for two hours per day but was unable to do so due to back and leg pain and opined that she was totally disabled from gainful employment. Dr. Yeash noted that appellant "currently states that her condition has not changed and, in fact, has worsened over the course of the last two years." He noted that appellant complained to left leg weakness, hypersensitivity, decreased feeling in her toes and heel and poor circulation. Dr. Yeash noted that her examination had not changed and that objective evidence included weakness of the anterior tibial and peroneal muscles of the left foot and weakness in extension and flexion of her toes. He opined that appellant had significant left lower extremity weakness and pain, as well as significant degenerative disc disease in the lumbosacral spine.

In a June 18, 1998 report from Dr. Yeash, he noted appellant's injury and that she "subsequently has had severe back pain that has rendered her unable to work. She is unable to maintain any position consistently. If she is sitting, she is unable to sit for any period of time -- she must switch into another position, either standing or lying down." Dr. Yeash noted that it was determined that appellant could perform telephone solicitation for four hours per day, but he stated that she was unable to sit comfortably which would be required in a telephone solicitor position.

By decision dated November 24, 1998, the Office rejected appellant's recurrence of disability claim finding that the evidence of record failed to establish that she sustained a recurrence of disability on or about September 1, 1997.

Appellant requested an oral hearing which was held on June 29, 1999.

Appellant submitted a June 25, 1999 medical treatment note from Dr. Yeash which stated that appellant had sustained significant leg injuries which "caused her gait disturbances which contributed significantly to the pain that she currently suffers from." He noted that appellant's pain management included drugs which could impact upon her concentration, memory and communication skills, that she could not sit comfortably for extended periods of time due to back pain and that therefore "even a telephone soliciting job [would be] difficult." A copy of his June 1, 1998 report was also resubmitted. Medical reports from the 1980s, the 1970s and the 1960s were also submitted.

By decision dated October 7, 1999, the hearing representative affirmed the November 24, 1998 decision finding that the evidence did not demonstrate that appellant sustained a spontaneous material change in her condition without intervening injury or exposure and that it did not show that she had increased disability due to a consequential injury or that a light-duty assignment was taken away from appellant or terminated for any reason. The hearing

representative also found that appellant had not met her burden to establish a modified wage-earning capacity as she had not demonstrated a material change in her injury-related condition.

By letter dated December 10, 1999, appellant requested reconsideration and submitted a November 3, 1999 report, from Dr. Yeash, which noted as follows:

“[Appellant] sustained a significant injury to her left leg in the munitions factory explosion. The leg injuries have caused her gait disturbances which have contributed significantly to the pain that she currently is suffering from. Her pain management includes medications which could, if taken regularly, impact her concentration, memory, communication skills, decision making and/or the ability to perform routine tasks. [Appellant] cannot sit comfortably for extended periods of time due to the back pain and the leg pain also at times is severe. These problems will absolutely preclude her from being gainfully employed, even including being unable to do a telephone soliciting job.”

By decision dated January 11, 2000, the Office denied modification of the October 7, 1999 decision. The Office found that the November 3, 1999 report from Dr. Yeash merely repeated his earlier, previously considered reports and that was conclusory and unrationalized.

The Board finds that appellant has failed to establish that she sustained a recurrence of disability commencing on or around September 1, 1997, causally related to her January 3, 1968 injuries.

As used in the Federal Employees’ Compensation Act,² the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.³ An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that

² 5 U.S.C. §§ 8101-8193.

³ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation. See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury). Cf. 5 U.S.C. § 8107 (entitlement to schedule compensation for loss or permanent impairment of specified members of the body).

conclusion with sound medical reasoning.⁴ Causal relationship is a medical issue and can be established only by medical evidence.⁵

Dr. Steinhardt opined that appellant remained totally disabled due to the diagnoses: “[r]esiduals of soft tissue injury to left leg with residual scarring, [c]hronic lumbosacral sprain, [and] [s]train left hip region” and continued to require medication and the use of a cane. Appellant’s symptoms were noted continually to be unchanged.

Dr. Yeash noted that appellant “currently states that her condition has not changed and, in fact, has worsened over the course of the last two years,” but noted that appellant complained to left leg weakness, hypersensitivity, decreased feeling in her toes and heel and poor circulation, and noted that her examination had not changed. This observation does not support that appellant had any September 1997 worsening of her injury-related condition, only that appellant believed that her condition had worsened. Dr. Yeash noted that objective evidence included weakness of the anterior tibial and peroneal muscles of the left foot and weakness in extension and flexion of her toes, but he failed to analyze how these symptoms were worse than the symptoms reported by Dr. Steinhardt or other former treating physicians. He opined that appellant had significant left lower extremity weakness and pain, as well as significant degenerative disc disease in the lumbosacral spine but did not explain how this was different from her presentation prior to 1997. In subsequent reports he noted that appellant could not work due to possible medication side-effects and could not sit for four hours per day. However, insufficient evidence was presented to establish the alleged recurrence or to support total disability. The reports of Dr. Yeash are of diminished probative value.⁶

The Board has held that medical opinions which are speculative or equivocal in character have little probative value.⁷ Dr. Yeash speculated that appellant’s pain medication could cause cognitive problems. As this statement is conclusory, it is also of diminished probative value. The weight of medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician’s knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the opinion.⁸ Dr. Yeash’s multiple repetitive reports lack any sort of medical rationale as to what, objectively, was the nature of appellant’s allegedly increased disability in September 1997 and as to how it is causally related to her original employment injuries.

As there was no other rationalized medical evidence submitted to the record that established that appellant had any material worsening in September 1997 of her preexisting conditions, she has failed to establish that any recurrence of total disability had recurred.

⁴ *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

⁵ *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

⁶ *See Leon Harris Ford*, 31 ECAB 514 (1980); *Neil Oliver*, 31 ECAB 400 (1980); *Leontine F. Lucas*, 30 ECAB 925 (1979).

⁷ *Linda I. Sprague*, 48 ECAB 386 (1997); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

⁸ *Anna C. Leanza*, 48 ECAB 115 (1996).

The Board also finds that the Office properly denied to modify appellant's loss of wage-earning capacity determination.

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁹

Appellant has not provided sufficient rationalized medical evidence to support that as of September 1997 she developed a material change in the nature or extent of her injury-related conditions which would affect her wage-earning capacity determination. Both Drs. Steinhardt and Yeash noted in their multiple reports that appellant's condition was the same as before and neither noted any objective changes on or after September 1997 or discussed causal relation with her accepted employment injuries. They merely opined that appellant was totally disabled from her myriad of conditions and was unable to work. As these reports were not rationalized or revealing of further objective injury on or around September 1997, they are insufficient to warrant modification of the prior loss of wage-earning capacity.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 11, 2000 and October 7, 1999 are hereby affirmed.

Dated, Washington, DC
February 26, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁹ *Daniel J. Boesen*, 38 ECAB 556 (1987).